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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. JESSE BREWER ARMITAGE, Defendant and Appellant.	C085430 (Super. Ct. No. 15F06000)

Defendant Jesse Brewer Armitage was detained after he fled from approaching police officers investigating a possible purse-snatching. A search of his pockets uncovered a cell phone tying him to a burglary from the day before. In the criminal proceeding that followed, defendant filed a motion to suppress the cell phone evidence, arguing his detention was unlawful and the evidence flowing therefrom was, therefore, inadmissible. The trial court denied the motion and a jury later found defendant guilty of

first degree robbery, first degree residential burglary, and obstructing a peace officer, a misdemeanor.[1]

On appeal, defendant contends the trial court erred in denying his motion to suppress because the arresting officer did not have reasonable suspicion to detain him and any evidence from the unlawful detention should have been suppressed as fruit of the poisonous tree. Defendant also contends his abstract of judgment should be corrected to properly reflect his presentence custody credits. We agree the judgment must be modified to reflect the proper presentence custody credits, and we will affirm the judgment as modified. On remand, we direct the trial court to exercise its discretion under Penal Code[2] sections 667, subdivision (a), and 1385, subdivision (b), as amended by Senate Bill No. 1393 (effective January 1, 2019),[3] to consider whether to strike defendant's enhancement for his prior serious felony conviction. (Stats. 2018, ch. 1013, §§ 1-2.)

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[1] We disagree with defendant's representation that the trial court dismissed the misdemeanor. The misdemeanor was originally charged in a separate case from the two felonies (case No. 15M13175). However, the court consolidated those cases during trial when the prosecution moved to amend the complaint. Defendant misinterprets the court's statement at the end of sentencing that it "will dismiss the 15M case . . . ." The court was not dismissing the misdemeanor *charge*, but rather the separate misdemeanor *case* "as having been superseded by it[s] incorporat[ion] into the 15F case ending 600."

[2] Undesignated section references are to the Penal Code unless otherwise specified.

[3] The effective date of nonurgency legislation is January 1 of the year following its enactment. (Cal. Const., art. IV, § 8, subd. (c); *People v. Camba* (1996) 50 Cal.App.4th 857, 865.)

FACTUAL AND PROCEDURAL BACKGROUND

I

The Burglary, The Detention, And Defendant's Arrest

On the morning of September 30, 2015, Amanda Watson left her apartment to use the laundry room in her apartment complex. She left her white Samsung cell phone on the kitchen counter, and both the front and security screen doors closed but unlocked. A few minutes later, she returned to find her apartment doors ajar and defendant inside her apartment. When defendant saw Watson in the apartment hallway, he moved towards her and the door, pushing her aside and causing her to fall against the wall. After defendant left, Watson noticed her cell phone was missing from the kitchen counter. Watson ran after defendant to retrieve the phone, but he got away.

Watson used her neighbor's cell phone to call 911. Based on Watson's description and a police records search, the responding officers identified defendant as a parolee. Their search for him was unsuccessful. The officers filed their report late that evening but did not broadcast defendant's description.

The next afternoon, a Taco Bell employee called 911 to report a purse-snatching. A responding officer spoke to the caller on-site. The employee said the man and woman involved in the purse-snatching were in the McDonald's parking lot to the south and pointed out the window to a group of people outside. When the officer and his partner walked over to the group, defendant stood up, walked, and then ran away. The officers chased and eventually detained defendant. When the arresting officer searched defendant's shorts pockets, he found a white Samsung cell phone, which defendant claimed was his.

After hearing the radio description of defendant, officers picked up Watson and drove her to the Taco Bell to see if she could identify defendant as the person in her apartment the day before. Watson recognized defendant based on his facial characteristics and clothing. An officer gave Watson the white cell phone seized from

defendant's pocket, which she identified as hers by "the nick on the bottom" and her contact information when she turned it on.

II

The Motion To Suppress

After the preliminary examination, defendant filed a motion to suppress the cell phone evidence under section 1538.5.

Arresting Officer Kurt Wilhite, the sole witness at the hearing, testified the 911 caller described the purse-snatching suspect as a "[m]ale white adult, approximately 5 foot 4 inches tall, wearing a black shirt and jeans." The caller last saw the man running out of the restaurant with a purse, with a woman running after him. When Officer Wilhite and his partner arrived at the Taco Bell, the employee who made the call told Officer Wilhite the incident may have been an argument between the couple, but "pointed to the south, in front of McDonald's [next door], and stated that both the male and the female were outside in the parking lot now." From where he was standing, Officer Wilhite could see the group through the Taco Bell window.

As Officer Wilhite approached the group in uniform, "[defendant] looked over, noticed [Officer Wilhite]. He then stood up and started to walk away . . . ." Instead of stopping at the officer's request, defendant "turned to [Officer Wilhite], smiled and beg[a]n running away." Officer Wilhite and his partner chased defendant and eventually apprehended him.

While Officer Wilhite was aware of the incident from the day before, he did not learn that defendant was involved or was on parole with an outstanding arrest warrant until after the detention and search. Officer Wilhite confirmed defendant was not the purse-snatching suspect and was not involved in that incident. Another officer later determined the purse-snatching was just a couple's argument between a different man and woman, and not a crime. Although he was hesitant to guess defendant's ethnicity, Officer Wilhite conceded he would not describe defendant as a "male white adult," as the

911 caller had. He also acknowledged defendant was wearing a black shirt and shorts, not jeans, and defendant was not engaged in any criminal activity when the officer started walking toward him.

Defense counsel argued, among other things, that the warrantless detention violated the Fourth Amendment and the resulting cell phone evidence had to be suppressed because the investigatory detention was not based on reasonable suspicion of defendant's criminal activity: defendant was not acting unlawfully when Officer Wilhite approached and the officer did not know defendant was involved in the earlier burglary until after the search. Further, defense counsel argued, no factors other than defendant's flight -- insufficient by itself under Supreme Court precedent -- provided reasonable suspicion connecting defendant to the suspected purse-snatching, especially when defendant's characteristics and clothing did not match the purse-snatching suspect's description. Defense counsel asserted the employee pointing to McDonald's did not give the "police the right to search or detain everybody in [the] general vicinity, regardless of their description . . . ." The prosecution maintained the officer had reasonable suspicion for an investigatory detention under the totality of the circumstances because he was investigating a possible felony under section 211.

The trial judge (J. McFetridge) denied defendant's motion, finding sufficient justification for detention based on the totality of the circumstances. The judge found it significant that Officer Wilhite was "told by the person who made the call that the people involved . . . were sitting in an area observable directly by [him]." The officer was "understandably and reasonably and objectively" justified in relying on the Taco Bell employee's identification of the man and woman involved. He "did what a police officer would normally and reasonably do in this situation and approached the couple to investigate." The judge also explained defendant's standing up and walking away was insufficient by itself to give rise to reasonable suspicion but once told to stop by the police, defendant's turning, smiling, and flight "place[d] this case squarely within the

Supreme Court's holding in [*Illinois v.*] *Wardlow* [(2000) 528 U.S. 119, 125 [145 L.Ed.2d 570, 577]] as well as other California cases that have followed that decision."

III

Verdicts And Sentencing

The jury found defendant guilty of first degree robbery, first degree residential burglary, and obstructing a peace officer (a misdemeanor), and found true that defendant had prior convictions for attempted murder and assault with force likely to produce great bodily injury. The court sentenced defendant to an aggregate term of 18 years in prison as follows: the upper term of six years for first degree robbery doubled to 12 years due to defendant's prior strike, the upper term of six years for first degree burglary doubled to 12 years due to defendant's prior strike (stayed pursuant to section 654), 90 days in county jail for the misdemeanor (to be served concurrent with the first degree robbery prison term), five years for the attempted murder prior conviction under section 667, subdivision (a), and one year for the assault with force likely to produce great bodily injury prior conviction under section 667.5, subdivision (a). The court awarded defendant 788 days of presentence custody credits, consisting of 686 days actually served and 102 days of good time/work time.

DISCUSSION

I

The Trial Court Properly Denied Defendant's Motion To Suppress

A

Standard Of Review

Our standard of review is well settled. " 'Our review of issues related to the suppression of evidence seized by the police is governed by federal constitutional standards.' [Citations.] 'In reviewing a trial court's ruling on a motion to suppress evidence, we defer to that court's factual findings, express or implied, if they are supported by substantial evidence. [Citation.] We exercise our independent judgment in

determining whether, on the facts presented, the search or seizure was reasonable under the Fourth Amendment.' " (*Robey v. Superior Court* (2013) 56 Cal.4th 1218, 1223.)

The Fourth Amendment's protections against unreasonable searches and seizures by law enforcement extend to brief investigatory detentions falling short of arrest. (U.S. Const. amend. IV; *United States v. Arvizu* (2002) 534 U.S. 266, 273 [151 L.Ed.2d 740, 749]; *Terry v. Ohio* (1968) 392 U.S. 1, 19 [20 L.Ed.2d 889, 904].) Investigatory detentions require objectively reasonable suspicion that "criminal activity is afoot and that the person to be stopped is engaged in that activity." (*People v. Souza* (1995) 9 Cal.4th 224, 230; see also *In re Tony C.* (1978) 21 Cal.3d 888, 893 [investigating officer must point to "specific and articulable facts" that (1) some activity relating to crime has taken place, is occurring, or is about to occur, and (2) the person he intends to stop is involved in that activity].)

We look at the " 'totality of the circumstances' of each case to see whether the detaining officer has a 'particularized and objective basis' for suspecting [defendant's] legal wrongdoing." (*United States v. Arvizu*, *supra*, 534 U.S. at p. 273 [151 L.Ed.2d at p. 749] [rejecting Ninth Circuit's "divide-and-conquer approach"].)

B

Totality Of The Circumstances

In his opening brief, defendant contends there was no evidence he fled police, and even assuming he did, the trial court improperly relied solely on his flight to support the officer's reasonable suspicion to detain.[4] Before we address reasonable suspicion, we note two problems with defendant's argument.

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[4] Defendant appears to argue the trial court regarded the flight as "consciousness of guilt." However, defendant provides no record citation and we need not consider contentions without supporting citations. (Cal. Rules of Court, rule 8.204(a)(1)(C).) Even so, we find no evidence in the record the court considered defendant's flight to be consciousness of guilt.

First, defendant's claim that there is no evidence he fled police is belied by the record. Officer Wilhite, the only witness at the suppression hearing, testified regarding defendant's actions, including his flight. Thus, substantial evidence supports the trial court's finding defendant fled the police and we defer to that express factual finding. (*Robey v. Superior Court*, *supra*, 56 Cal.4th at p. 1223.)

Second, as the People note, and we agree, the trial court did not rely on flight alone in finding reasonable suspicion.[5] Rather, the judge found the totality of the circumstances -- the officer, investigating a suspected felony, received information from "*the person who made the call* that the people involved . . . were sitting in an area observable directly by Officer Wilhite," coupled with defendant's flight -- justified the detention. (Italics added.)

Turning to the question of reasonable suspicion, we note, "even though a person's flight from approaching police officers may stem from an innocent desire to avoid police contact, flight from police is a proper consideration -- and indeed can be a key factor -- in determining whether . . . police have sufficient cause to detain." (*People v. Souza*, *supra*, 9 Cal.4th at p. 235; see also *United States v. Sokolow* (1989) 490 U.S. 1, 9-10 [104 L.Ed.2d 1, 11-12] [noting wholly lawful conduct could justify reasonable suspicion in the totality of the circumstances].) However, such flight "must be combined with other objective factors that give [rise] to an articulable suspicion of criminal activity." (*People v. Washington*, *supra*, 192 Cal.App.3d at p. 1124; see also *Souza*, at p. 239 [objective

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[5] Had the trial court relied on flight alone, defendant would be correct. Flight alone is insufficient to support reasonable suspicion. (*People v. Washington* (1987) 192 Cal.App.3d 1120, 1124; *People v. Bower* (1979) 24 Cal.3d 638, 648; *People v. Aldridge* (1984) 35 Cal.3d 473, 479; *Florida v. Royer* (1983) 460 U.S. 491, 497-498 [75 L.Ed.2d 229] [flight alone insufficient because a person has the basic right to decline to answer an officer's questions and to "go on his way"]; *People v. Souza, supra,* 9 Cal.4th at p. 239 [declining to adopt bright-line rule otherwise].)

factors such as time, location, lighting, and area's reputation for criminal activity may be relevant to a trained officer].)

Defendant's reliance on *Bower* and *Washington* is misplaced because those cases are distinguishable; flight plus other objective factors exist here. (*People v. Bower*, *supra*, 24 Cal.3d at p. 649; *People v. Washington*, *supra*, 192 Cal.App.3d at p. 1124.) In *Bower*, the testifying officer saw the defendant, a Caucasian man, and several African-American men and women conversing around "the projects" at 8:30 p.m. (*Bower*, at pp. 641-642.) The officer was suspicious because he had previously arrested other Caucasian people for drug offenses there and had " 'never observed a white person in the projects . . . on foot in the hours of darkness or [*sic*] for innocent purpose.' " (*Id*. at p. 642.) The group disbursed when several officers approached. (*Id*. at pp. 642-643.) The testifying officer " 'picked one individual out' [the defendant] and, while that person was proceeding at a 'very quick walk, almost a run,' . . . the officer told him to stop." (*Id*. at p. 643.) The defendant complied and the officer found a gun during a safety patdown. (*Ibid*.)

Reversing the denial of the defendant's motion to suppress, our Supreme Court held the officer lacked reasonable suspicion to detain the defendant because the defendant's race, the late hour, the high-crime area, and the defendant's furtive behavior did not point to any criminal activity by the defendant. (*People v. Bower*, *supra*, 24 Cal.3d at p. 649.) In that case, the burden on the defendant's constitutional freedom to avoid police contact outweighed the officer's need to investigate further, absent objective evidence of criminal activity. (*Ibid*.)

Similarly, in *Washington*, the officers on patrol came across a group of men, including the defendant, in a "huddle." (*People v. Washington*, *supra*, 192 Cal.App.3d at p. 1122.) The group dispersed when they saw the officers. (*Ibid*.) The officers followed only the defendant as he walked briskly away, and after they called out to him, the defendant began to run. (*Ibid*.) The police picked up a packet of cocaine the defendant

discarded during the chase and charged him with possession. (*Id*. at pp. 1122-1123.) The Court of Appeal reversed, concluding: "Prior to [the] defendant's abandonment of the contraband, the circumstances of [the] defendant's actions were not reasonably consistent with criminal activity." (*Id*. at p. 1124.) There was nothing inherently suspicious about the men in the huddle. The officers' believing " 'black men [they] see in the project usually have something to hide when they run' " was mere speculation carrying no weight. (*Ibid*.; see *In re Tony C.*, *supra*, 21 Cal.3d at p. 893 [investigative detention cannot be based on "mere curiosity, rumor, or hunch"].) The officers gave no justification for singling out the defendant. (*Washington*, at p. 1124.) Defendant's flight alone was insufficient, lacking other objective factors. (*Ibid*.)

Unlike *Bower* and *Washington*, this case is not based solely on an officer's hunch or other background facts unrelated to defendant. Here, the officer responded to an active 911 report and did not approach the group outside McDonald's until the Taco Bell employee directed him to the group (which Officer Wilhite could see) and said the man and woman involved in the purse-snatching were within that group. Moreover, Officer Wilhite did not target defendant until he singled himself out by walking away from the group. (Cf. *People v. Bower*, *supra*, 24 Cal.3d at p. 643; *People v. Washington*, *supra*, 192 Cal.App.3d at p. 1124.)

Defendant's apparent contention that his lack of criminal activity at the time of Officer Wilhite's approach invalidates the detention is unpersuasive because he fails to account for the totality of the circumstances. (See *United States v. Sokolow*, *supra*, 490 U.S. at pp. 9-10 [104 L.Ed.2d at pp. 11-12] [innocent factors taken together may amount to reasonable suspicion]; see also *People v. Brown* (2015) 61 Cal.4th 968, 984 [objective factors can include defendant's proximity in time and space to the place of the reported crime].) That the Taco Bell employee later expressed uncertainty whether a crime had occurred does not change the analysis; the uncertainty gave the officer cause to

investigate further. (*In re Tony C.*, *supra*, 21 Cal.3d at p. 894 [an investigation's principal function is to resolve ambiguity and determine whether activity is illegal].)

As the United States Supreme Court has noted, while defendant's flight was "perhaps innocent in itself," such behavior taken together with other objective factors -- here, the 911 call, the discussion with the Taco Bell employee, defendant's location at McDonald's, and defendant's response to the officer's request to stop (i.e., turning, smiling, and running away) -- "warrant[ed] further investigation" and justified an investigatory stop and patdown for weapons. (*Terry v. Ohio*, *supra*, 392 U.S. at pp. 22, 30-31 [20 L.Ed.2d 889, 907, 911]; see also *Illinois v. Wardlow*, *supra*, 528 U.S. at p. 125 [145 L.Ed.2d at p. 577] [stop and frisk justified when defendant held an opaque bag and ran "headlong" upon seeing a caravan of patrol cars in a heavy drug-trafficking area]; *People v. Souza*, *supra*, 9 Cal.4th at pp. 234-235 [noting difference between reasonably declining to answer an officer's questions and fleeing at first sight of officer -- the latter can be a "stronger indicator of consciousness of guilt"].)

In reply, defendant asserts the officer improperly relied on the 911 call because the anonymous tip lacked sufficient corroboration. (See *Alabama v. White* (1990) 496 U.S. 325, 331 [110 L.Ed.2d 301, 309-310]; *Florida v. J.L.* (2000) 529 U.S. 266, 272 [146 L.Ed.2d 254, 261] [truly anonymous tip must be reliable in its assertion of illegality].) The People maintain the statement does not require corroboration because the witness was a "citizen informant" who is presumed reliable. (*People v. Ramey* (1976) 16 Cal.3d 263, 269.) We need not decide whether the Taco Bell employee was an anonymous or a citizen informant because the 911 call coupled with the officer's later discussion with the caller was sufficiently reliable to give rise to reasonable suspicion to investigate the group's involvement in the possible purse-snatching.

The caller first provided the basis for his or her personal knowledge, having personally seen the man running out of the Taco Bell with a purse, and then calling 911 to report it. (See *Navarette v. California* (2014) 572 U.S. 393, 399 [188 L.Ed.2d 680,

687-688] [anonymous report by eyewitness especially reliable if contemporaneous].) The caller then openly aided the officer in person by pointing to the group in front of the McDonald's, where the officer could see them. (*People v. Galosco* (1978) 85 Cal.App.3d 456, 461 [caller who reported crime and then openly aided arriving officer by directing them to suspects' whereabouts was not required to verify his name to be sufficiently reliable].) Finally, the caller worked at the Taco Bell, and we can infer he or she could "be held responsible if [his or] her allegations turn out to be fabricated." (*Florida v. J.L.*, *supra*, 529 U.S. at p. 270 [146 L.Ed.2d at p. 260].)

The People concede the description of the purse-snatcher from the 911 call did not entirely match defendant's characteristics. Nonetheless, the Taco Bell employee's indication that the suspect was in defendant's group was sufficient to meet the lower reasonable suspicion standard for the officer to investigate the group's involvement in the reported criminal activity. (*Alabama v. White*, *supra*, 496 U.S. at p. 330 [110 L.Ed.2d at p. 309] [reasonable suspicion can arise from less reliable information than for probable cause].)

We conclude the officers had reasonable suspicion to detain and search defendant in the totality of the circumstances, and the trial court did not err finding the same. (*People v. Souza*, *supra*, 9 Cal.4th at p. 242.) Accordingly, we do not address defendant's fruit of the poisonous tree argument.

II

Defendant's Presentence Custody Credits Must Be Corrected

Defendant contends he is entitled to additional presentence custody credits. As a general rule, a defendant must first file a motion with the trial court to correct custody credit calculations.[6] (§ 1237.1; *People v. Fares* (1993) 16 Cal.App.4th 954, 960.) As

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[6] Section 1237.1 provides: "No appeal shall be taken by the defendant from a judgment of conviction on the ground of an error in the calculation of presentence

defendant concedes, he did not do so. Nonetheless, because it is not the sole issue on appeal, is undisputed, and is essentially arithmetic in nature, we will consider the issue in the interests of judicial economy. (*People v. Guillen* (1994) 25 Cal.App.4th 756, 764.)

Defendant was in custody from his arrest on October 1, 2015, through his sentencing on August 18, 2017, a total of 688 days.[7] At sentencing, the court awarded defendant "686 days credit for time actually served, plus an additional 102 days good time/work time, for a total of 788 days credit time served." Defendant argues he should have been awarded credit for 790 days, "consisting of 687 actual days and 103 good time/work time local conduct credits." The People concede the error, but disagree on the number of days.

"A defendant is entitled to actual custody credit for 'all days of custody' in county jail . . . including partial days. [Citations.] Calculation of custody credit begins on the day of arrest and continues through the day of sentencing." (*People v. Rajanayagam* (2012) 211 Cal.App.4th 42, 48 [quoting § 2900.5, subd. (a)]; see also *In re Marquez* (2003) 30 Cal.4th 14, 25 [calculating credits includes the day of sentencing].) We conclude defendant is entitled to 688 days of actual time in custody.

Because defendant was convicted of robbery and burglary, "violent felonies" under section 667.5, his custody credits "shall not exceed 15 percent of the actual period of confinement." (§ 2933.1, subd. (c).) Fifteen percent of his 688 actual days is 103.2, which rounds down to 103 days. (*People v. Ramos* (1996) 50 Cal.App.4th 810, 816

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custody credits, unless the defendant first presents the claim in the trial court at the time of sentencing, or if the error is not discovered until after sentencing, the defendant first makes a motion for correction of the record in the trial court, . . . informally in writing."

[7] The probation report erroneously lists defendant's custody end date as July 17, 2017. As defendant remained in custody until he was sentenced on August 18, 2017, we regard this as a clerical error.

[“ ‘15 percent’ means exactly 15.00 percent and nothing more”].) The judgment must be modified to award defendant 791 days (688 actual days plus 103 days for time served).

In addition, we modify the judgment and direct the trial court to correct the abstract of judgment to reflect the correct Penal Code section reference for the one-year enhancement for a prior conviction; it is not section 667.5, subdivision (a), but rather section 667.5, subdivision (b), as correctly identified in the amended complaint.

III

Directive To Exercise Discretion Pursuant To Senate Bill No. 1393 On Remand

We asked the parties to submit supplemental briefing addressing whether the Legislature’s recent amendments to sections 667, subdivision (a), and 1385, pursuant to Senate Bill No. 1393 apply to this case. Defendant argues the amendments apply retroactively and the trial court should be allowed to exercise its discretion to consider striking his prior serious felony enhancement on remand. The People agree, and so do we.

At sentencing, the trial court had no discretion to strike a prior serious felony conviction resulting in a five-year enhancement. (See *People v. Valencia* (1989) 207 Cal.App.3d 1042, 1045.) Senate Bill No. 1393 amended sections 667, subdivision (a), and 1385, subdivision (b), to remove this prohibition and to vest the trial court with discretion to do so. (Stats. 2018, ch. 1013, §§ 1-2.) The amendments in Senate Bill No. 1393 apply retroactively to this nonfinal case for the same reasons we discussed in *Woods*. (*People v. Woods* (2018) 19 Cal.App.5th 1080, 1090-1091.) We, therefore, instruct the trial court to exercise its discretion in considering whether to strike the prior serious felony conviction enhancement on remand.

DISPOSITION

The judgment is modified to award defendant 791 days of presentence custody credits and to change the Penal Code section referenced for the one-year enhancement from section 667.5, subdivision (a) to section 667.5, subdivision (b). As modified, we

affirm the judgment. The trial court shall direct the clerk to amend the abstract of judgment to reflect the judgment as modified. A copy of the amended abstract of judgment shall be sent to the Department of Corrections and Rehabilitation.

On remand, we further direct the trial court to exercise its discretion in considering whether to strike defendant's prior serious felony conviction pursuant to amended sections 667, subdivision (a), and 1385, subdivision (b).

/s/
Robie, Acting P. J.

We concur:

/s/
Mauro, J.

/s/
Duarte, J.